No. 84-641

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
BROTHERHOOD OF RAILROAD SIGNALMEN,
BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
and the UNITED TRANSPORTATION UNION,
Petitioners,

v.

UNITED STATES OF AMERICA, and the
INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*

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In January 1985, respondents Union Pacific Corporation and Missouri Pacific Corporation, along with their three operating railroads [hereinafter, "Applicant respondents"], and the United States, along with the Interstate Commerce Commission [hereinafter, "Federal respondents"], filed separate briefs in opposition to the three petitions which had been filed with this Court for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the

decision of that court in *Southern Pacific Transportation Co.* v. *ICC,* 736 F.2d 708 (D.C.Cir. 1984). Both the Federal and the Applicant respondents made several factual statements and legal arguments in their briefs to which petitioners in No. 84-641 believe a response should be made. Therefore, petitioners Brotherhood of Maintenance of Way Employes, *et al.* [hereinafter, "Rail Labor petitioners"], respectfully submit this Reply Brief pursuant to Rule 22.5 of the Rules of this Court.

I. Rail Labor's Challenge To The Commission's Failure To Consider The Interests of *All* Railroad Employees Does Not Present A Fact-Bound Issue, But, Rather, Presents A Conflict In Statutory Interpretation, The Resolution Of Which Is Crucial To The Orderly Administration of the Interstate Commerce Act

When this case was before the court of appeals, Rail Labor asked that court to set aside the Interstate Commerce Commission's [hereinafter, "ICC" or "Commission"] approval of the Union Pacific's control of the Missouri Pacific and Western Pacific, in part, because that agency had not complied fully with Congress' directive in 49 U.S.C. § 11344(b)(1)(D). That section, Rail Labor asserted, provides that in determining whether such a control transaction is consistent with the public interest, the Commission must consider the interests of all railroad employees who might be affected by the proposed transaction, including non-applicant carrier employees. In rejecting Rail Labor's argument as to the scope of that section, the court of appeals did not conduct a factual examination of the ICC's decision to ascertain whether that agency had in fact examined the interests of *all* railroad employees. Rather, Rail Labor's argument was rejected because the court, by referring to its earlier decision in *Lamoille Valley R.R.* v. *ICC,* 711 F.2d 295 (D.C.Cir. 1983), concluded that the Commission need not consider the interests of non-applicant railroad employees in determining whether the transaction was in fact consistent with the public interest.

Even though the court of appeals rejected Rail Labor's argument for a purely legal reason, the federal respondents nevertheless argue to this Court that Rail Labor's challenge on this issue presents a "fact-bound" question, and, thus, should not be entertained by this Court. Fed. Resp. Br. at 7. Moreover, the Government asserts further that this Court need not consider whether 49 U.S.C. § 11344(b)(1)(D) includes within its scope non-applicant railroad employees, because the Commission "specifically considered the interests of persons employed by railroads other than the applicants" in approving the control application. *Id.* at 15 n.18. Besides being factually erroneous,[1] the Government's arguments on this point serve only to highlight why this Court should grant Rail Labor's request for a writ of certiorari.

Section 11344(b) of the Interstate Commerce Act, 49, U.S.C. § 11344(b), sets forth some of the factors which Congress has commanded the ICC to consider in determining whether a control transaction is in fact consistent with the public interest. As the courts of appeals have recognized, the "[f]ailure to consider all congressionally mandated factors is clearly grounds for setting aside agency action." *Detroit, Toledo & Ironton R.R.* v. *United States,* 725 F.2d 47, 51 (6th Cir. 1984). Consequently, it is clear that the correct scope and

[1] Respondents' assertions that the ICC did in fact examine the impact of the control transaction on non-applicant employees, are simply not supported by the ICC's decision. A review of that agency's lengthy decision shows that the ICC acknowledged that it had to consider the interests of all railroad employees affected by the transaction (*e.g.*, App. B at 60a), but then considered the impact of the transaction on Applicants' employees only. *Id.* at 276a-80a. Surely, such consideration does not comply with the law. *See Central Transport, Inc.* v. *United States,* 694 F.2d 968, 972 (4th Cir. 1982). The Federal respondents attempt to support their view of the record by referring to that portion of the ICC's decision where the agency refused to increase the levels of protection for affected employees. *Id.* at 278a-80a. Respondents' reference to that portion of the ICC's decision does not support their contention that the agency considered the interests of non-applicant employees, because the referred-to-portion of the ICC's decision is taken out of context. In that portion of the decision, the ICC was considering the levels of protection required by Section 11347—*e.g.*, whether affected employees would be required to move—and not the question of whether those protections should protect non-applicant employees.

interpretation of 49 U.S.C. § 11344(b)(1)(D) is crucial both to an orderly administration of the Interstate Commerce Act and to the proper implementation of Congress' directives concerning rail consolidations.

In this case, the Commission recognized in its decision (*e.g.*, App. B. at 60a, 84a) and in its brief to the court of appeals (ICC Br. at 19, 76) that Section 11344(b)(1)(D) refers to all railroad employees who might be affected by a control transaction, and not just to employees of the applicants. Moreover, the federal respondents have implicitly conceded in their brief to this Court that Rail Labor's interpretation of the scope of Section 11344(b)(1)(D) is correct. Fed. Resp. Br. at 14-15 n.18. But nevertheless, according to the court of appeals in this case, the ICC's view of the broad scope of Section 11344(b)(1)(D) is no longer the law, at least in the District of Columbia Circuit.

As Rail Labor noted in its petition to this Court (Pet. at 13-14), all but one reviewing court [2] which had addressed this issue either directly or indirectly prior to the *Lamoille Valley* case, had either assumed or concluded that the ICC's broad interpretation of the scope of Section 11344(b)(1)(D) and its predecessor [3] was the proper construction of that statute. *E.g.*, *Soo Line R.R.* v. *United States,* 280 F.Supp. 907, 923 (D.Minn. 1968) (3 Judge Court); *Railway Labor Executives' Assoc.* v. *United States,* 216 F.Supp. 101, 102-03 (E.D.Va. 1963) (3 Judge Court); *accord, Missouri-Kansas-Texas R.R.* v. *United States,* 632 F.2d 392, 412-13 (5th Cir. 1980), *cert. denied,* 451 U.S. 1017 (1981). Consequently, the D.C. Circuit's narrow interpretation of Section 11344(b)(1)(D) is in conflict both

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[2] *Florida E.C. Ry.* v. *United States,* 259 F.Supp. 993 (M.D.Fla. 1966) (3 Judge Court), *appeal on relevant part dismissed as moot sub nom. Railway Labor Executives' Assoc.* v. *United States,* 386 U.S. 544 (1967). In their Brief, the federal respondents incorrectly imply that the labor issue of the *Florida East Coast* case was affirmed by this Court. Fed. Resp. Br. at 15-16 n.20.

[3] 49 U.S.C. § 5(2)(c) was recodified by Pub. L. No. 95-473, 92 Stat. 1337 (1978), as 49 U.S.C. § 11344(b); *see,* Rail Labor's Petition at 8 n.5.

with decisions by other reviewing courts and with the ICC's longstanding view of that statutory provision.

That conflict, contrary to respondents' assertions, does not present a question of fact, but, rather, clearly presents an issue of law—*i.e.*, the proper interpretation of Section 11344(b)(1)(D) of the Interstate Commerce Act—which merits this Court's review. The factual issue—*i.e.*, whether the ICC considered the interests of *all* railroad employees as it asserts it did—will not be justiciable until this Court concludes that Rail Labor's construction of Section 11344(b)(1)(D), as the ICC acknowledges, is correct.

II. Contrary To Respondents' Assertions, The Issue Of Whether 49 U.S.C. § 11347 Requires The Commission To Impose An Arrangement Which Protects The Interests Of All Railroad Employees Affected By A Control Transaction, Presents An Issue Which Merits Review By This Court

Both the Federal and the Applicant respondents assert that the court of appeals' conclusion, that 49 U.S.C. § 11347 does not require the Commission to protect the interests of affected non-applicant railroad employees, is "consistent with the decisions of all of the court of appeals that have considered the question." *E.g.*, Fed. Resp. Br. at 15. Respondents then seek to enhance the import of that assertion by referring this Court to decisions by the Second, Fifth, Seventh, and D.C. Circuits. *E.g.*, Applicant Resp. Br. 11. Respondents reliance upon decisions by the Second and Seventh Circuit courts of appeals, however, is misplaced, for those courts neither addressed nor faced the non-applicant carrier issue in the decisions cited by respondents. *See, Brotherhood of Maintenance of Way Employes* v. *ICC*, 698 F.2d 315 (7th Cir. 1983); *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). Those cases involved challenges either by rail labor (*Maintenance of Way* case) or by the carriers (*New York Dock* case) to the levels of

protection provided by the ICC's standard employee protective conditions,[4] and did not raise the issue of whether those levels of protection extended to, or did not extend to, non-applicant railroad employees. Consequently, it is misleading and inaccurate to assert, as respondents do, that the court of appeals' decision in this case is consistent with decisions by the Second and Seventh Circuits.

When the relevant court of appeals' case authority is examined in this case, it becomes apparent that the D.C. Circuit's approach to the scope of 49 U.S.C. § 11347's protective obligations is consistent with only the decision by the Fifth Circuit in *Missouri-Kansas-Texas R.R.* v. *United States, supra.* However, as indicated earlier (p. 4, *supra),* the Fifth and D.C. Circuits do not fully agree on this issue because there is a conflict between those Circuits over the proper relationship between Section 11344(b)(1)(D) and Section 11347. Moreover, as Rail Labor showed in its petition (Pet. at 16-20), both the *Missouri-Kansas-Texas'* and D.C. Circuit's decisions rest upon foundations which are so replete with legal and factual errors as to require this Court, in the exercise of its supervisory power if for no other reason, to review the decision by the court of appeals in the case *sub judice.*

An example of the shifting-sand upon which the decision below rests may be seen from a cursory examination of the Federal respondents' efforts to defend the D.C. Circuit's *Lamoille Valley* case, 711 F.2d 295 (D.C. Cir. 1983). According to the Federal respondents (Fed. Resp. Br. at 15 n.19), the *Lamoille Valley* decision rests upon four points. "First, [the Court of appeals] . . . noted that the agency's reading of the statute was 'sensible,' because Section 11347 refers only to the

[4] In the *New York Dock* case, the carriers asserted that the amount of benefits afforded by the Commission's protections were too generous and too costly; those arguments were rejected by the Second Circuit. 609 F.2d at 94-95. In the *Maintenance of Way* case, rail labor argued that the Commission's standard protections did not give affected employees all of the benefits to which they were entitled (*e.g.,* more beneficial relocation protections); those arguments were rejected by the Seventh Circuit. 698 F.2d at 318.

rail carrier involved in the merger transaction and 'its employees' (711 F.2d at 323)." Fed. Resp. Br. at 15 n.19. Respondents' argument on this point fails to recognize that the language in Section 11347 to which the D.C. Circuit referred was added by the 1978 recodification. That recodification, however, was merely a restatement "without substantive change" of the prior statute and was not to be "construed as making a substantive change in the laws replaced." Section 3(a), Pub. L. No. 95-473, *supra,* 92 Stat. at 1466. Prior to its recodification, Section 11347's predecessor clearly and unambiguously provided that the protections were to be extended to "employees of the carrier or carriers by railroad affected by [the ICC's] . . . order . . . ." 49 U.S.C. § 5(2)(f) (repealed by Pub. L. No. 95-473, *supra*) (reproduced in Rail Labor's Petition at 7b). Consequently, it is improper to rest a narrow construction of Section 11347 upon the 1978 recodification.[5]

The second basis upon which the *Lamoille Valley* decision rests, according to respondents, is "that the legislative history of the statute supported the Commission's interpretation . . . ." Fed. Resp. Br. at 15 n.19. That view of the legislative history is refuted by the plain language which Congress used in 1940 when the predecessor of Section 11347 was first enacted. 49

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[5] The Federal respondents' reliance upon the terms of the 1978 recodification to support their interpretation of Section 11347 is disingenuous, for the ICC has recently refused to apply *Cosby* v. *ICC,* 741 F.2d 1077 (8th Cir. 1984), to other rail-motor carrier cases because, in its opinion, the *Cosby* court improperly relied upon the 1978 recodification to conclude that Congress had made a substantive change in Section 11347. As the ICC stated:

> In *Cosby,* the court stressed that, in recodifying section 5(2)(b), Congress changed "rail carrier employees" to "carrier employees" . . ., and, therefore, found that protection of all employees [including Motor Carrier employees] was required. This reading of the recodification totally and inaccurately ignores section 3 of the recodification, which states that "Sections 1 and 2 of this Act restate, without *substantive change,* laws enacted before May 16, 1978 . . . ." (emphasis added) . . . . Hence, no substantive change in the statute was made that requires us to protect motor employees . . . .

ICC Finance Docket No. 28640 (Sub-No. 9), *Chicago, M., St. P. & Pac. R.R.—Reorganization,* served January 11, 1985, slip op. at 16.

U.S.C. § 5(2)(f) (repealed). As this Court has noted before, the plain language is all that should be examined when the terms of a statute are clear and unambiguous. *E.g., Rubin* v. *United States,* 449 U.S. 424, 430 (1981). Moreover, other courts, looking at the relevant statutory language, have reached a result contrary to the D.C. Circuit's. *E.g., Soo Line R.R.* v. *United States, supra,* 280 F. Supp. at 922-24.

The third reason for the *Lamoille Valley's* decision upholding the ICC's narrow construction of its protection obligations under 49 U.S.C. § 11347, was that the ICC's interpretation was " 'supported by considerations of practicality and administrative economy' (711 F.2d at 323-24) . . . ." Fed. Resp. Br. at 15. n.19. That reasoning, however, does not justify a result contrary to the plain language of the statute, for the decision as to what is practical and administratively feasible is for Congress to make. Federal courts, petitioner respectfully submit, do not have the right to legislate under the guise of statutory interpretation. *United States Railroad Retirement Board* v. *Fritz,* 449 U.S. 166, 179 (1980).

The fourth and most fallacious reason advanced by the court of appeals below, and by respondents in support of that result, is that the ICC, the court stated, has consistently given Section 11347 a narrow interpretation. That factual assertion is plainly incorrect. As Rail Labor has explained in its petition (Pet. at 16-17), the issue as to the proper scope of Section 11347's predecessor was squarely raised in the 1960's and was presented to at least four reviewing courts under former 28 U.S.C. § 2321, *et seq.* (3 Judge Court deleted by Pub. L. No. 93-584, 88 Stat. 1917 (1975)), and all but one of those courts ruled that the scope of Section 11347 was limited solely by the question of whether the railroad employee was *affected* by the transaction, and not by the question of whether the employee's employer was an applicant. *Soo Line R.R.* v. *United States, supra,* 280 F.Supp. at 922-23; *Railway Labor Executives' Assoc.* v. *United States,* 226 F.Supp. 521, 525 (E.D.Va.) (3 Judge Court), *vacated on other grounds,* 379 U.S. 199 (1964); *Railway Labor Executives' Assoc.* v. *United States, supra,* 216 F.Supp. at 102; *but see, Florida East Coast Ry.* v. *United States, supra.*

While the ICC at first objected to the reviewing courts' view of the statute, that agency did not seek review of those decisions in this Court, and by 1974 it had clearly accepted the rationale of those decisions. In its *Pennsylvania R.R.—Merger* decision, 347 I.C.C. 536, 546 (1974), the ICC stated as follows:

> [S]ection 5(2)(f) of the act mandates that, as a condition to its approval, the Commission require a fair and equitable arrangement to protect the interests of the railroad employees affected. Such employees, to be protected, need fulfill only two requirements, they must be railroad employees and they must be affected by the merger. *Soo Line Railroad Company* v. *United States,* 280 F.Supp. 907 (1968). The protection required under the act is not limited to employees of carriers directly involved in the transaction. All railroad employees affected are under the aegis of the act. The only question is whether such employees are affected, i.e., touched sufficiently by the transaction. *Railway Labor Executives' Association* v. *United States,* 216 F.Supp. 101 (1963).[6]

Consequently, when the support for the decision below is viewed objectively, and when that decision is compared with the consistent decisions by the Three-Judge courts on this issue, it is apparent that respondents are incorrect in asserting that this case does not merit review by the Court.

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[6] The Federal respondents seek to distinguish the *Penn Central* decision by stating that it involved subsidiaries of the applicants and is therefore inapposite. Fed. Resp. Br. at 16 n.20. That assertion is specious. First, the decision itself did not state or even intimate that its reliance upon the *Soo* and *Railway Labor* cases was premised on that factual predicate. And second, the fact that the railroad employees involved were employees of Penn Central subsidiaries was relevant to only the second prong of the *Railway Labor* and *Soo* test—*i.e.*, were those employees sufficiently touched by the transaction to be deemed "affected."

CONCLUSION

For the reasons set forth herein and in the petition, the Rail Labor petitioners respectfully request that their petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

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